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IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF NEW JERSEY,
Plaintiff,

v.

STATE OF NEW YORK,
Defendant.

OFFICE OF THE SPECIAL MASTER

SUPPLEMENT TO
FINAL REPORT OF THE SPECIAL MASTER

May 30, 1997

PAUL R. VERKUIL
Special Master

17 pp

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BACKGROUND

A. Introduction

This Supplement to the Final Report of the Special Master ("Final Report") (Mar. 31, 1997) (Docket Item No. 385) describes in metes and bounds terms the remedy I recommended to the Court in my Final Report. To review briefly, I recommended that a boundary be drawn on Ellis Island dividing the sovereign states of New Jersey and New York based upon the following considerations.

First, I proposed "that the Court grant to New York sovereignty over the original or 1833 Ellis Island to the

low-water mark thereof.” Final Report at 154. Second, for what I considered compelling reasons, I found “that the 1857 United States Coast Survey map advocated by New Jersey for use in delineating the boundary on Ellis Island most accurately depicts the size and shape of the original Ellis Island to the MLW [mean low-water] mark.” *Id.* at 156. The 1857 map is reproduced at Appendix I attached to the Final Report. I relied upon the testimony of New York’s experts to accord New York 4.69 acres, the size they estimated for Ellis Island to the MLW mark in 1857. *Id.* at 160-61. To this figure, I added one half of the pier that is shown on an 1819 map included in Appendix J of the Final Report. I found New York’s testimony convincing that at least half of that pier, or 0.2 acres, had been undergirded by fill before the 1834 Compact was executed. *Id.* at 158-59. The acreage accorded New York was thus 4.89 acres. I also found that the current size and shape of Ellis Island is most accurately depicted by a 1995 survey by New Jersey expert Louis J. Marchuk introduced at trial and accepted by New York (the “1995 Marchuk Survey”). *Id.* at 159-60.

Having determined what the boundary should be according to the law, I concluded it was appropriate to recommend invocation of equitable principles of flexibility and practicality to create a workable boundary. I analyzed several potential methods for drawing that boundary, including a “template” approach achieved by placing over the 1995 Marchuk Survey a transparency of the 1857 map. I rejected this approach, finding it had the following major disadvantages: the boundary would (1) intersect and partition buildings, particularly the Main Building housing the National Immigration Museum; (2) be impractical and inconvenient; (3) insert a strip of New Jersey’s territory between New York and the heavily utilized ferry slip; (4) deny New York access to and authority over the land around the Main Building; and (5) separate sovereignty over the outdoor eating area attached to the Main Building from sovereignty over the

Main Building. *Id.* at 162-63. For all of these reasons, I recommended that the MLW acreage of 4.89 acres to be accorded New York be reconfigured into a boundary that would best accommodate a situation of divided sovereignty.

To achieve “the most practical, convenient, just, and fair boundary line consistent with the language of the 1834 Compact and applicable law,” *id.* at 164, I recommended that the Court accord New York 4.89 acres by means of a boundary line that intersected none of the three buildings which would have been divided by the template approach, and that would ensure New York’s sovereignty over the land between the Main Building and the ferry slip, the outdoor eating area adjacent to the restaurant within the Main Building, and an appropriate swath of land around the Main Building. *Id.* at 164-66. My recommended boundary before the metes and bounds survey was depicted at Appendix K attached to the Final Report.

My Final Report contemplated “[t]he final stage in this proceeding,” namely “to draw New York’s portion of Ellis Island on a map . . . and then to have the States jointly survey that area so as to produce for the Court a metes and bounds description capable of immediate implementation once this proceeding is final.” *Id.* at 13. After such a survey exercise by the States, I proposed to render a recommended survey of the precise boundary line. The following description and Designated Survey of my recommended boundary line (“the boundary”) on Ellis Island is filed pursuant to that mandate. This supplement thus completes paragraph 3 of the proposed Decree issued in conjunction with the Final Report. *See id.* at 170.

B. Procedural Steps

Immediately following the filing of my Final Report, the Office of the Special Master requested New Jersey and New York each to conduct surveys of the boundary on

Ellis Island and to report the results of these surveys. On April 9, 1997, New Jersey requested access from the National Park Service ("NPS") for the purposes of conducting a survey on Ellis Island on Monday, April 14, 1997. Letter from New Jersey Deputy Attorney General Robert A. Marshall to NPS Deputy Superintendent Lawrence Steeler (Apr. 9, 1997) (Docket Item No. 386). On April 10, 1997, New York urged me to delay the conduct of the surveys until after the filing of exceptions. New York suggested it was "premature and not without prejudice" to require a survey at this juncture. Letter from New York Assistant Attorney General Judith T. Kramer to Special Master Paul R. Verkuil at 1 (Apr. 10, 1997) (Docket Item No. 387).

1. April 10, 1997 Telephone Conference

On April 10, 1997, I convened a telephone conference in order to gauge the parties' progress in completing the surveys and to address New York's concerns and any other questions stemming from the Final Report. *See* Tr. 4/10/97 at 3-4 (Docket Item No. 395). Mr. Yannotti, on behalf of New Jersey, and Ms. Kramer, on behalf of New York, participated. *Id.* at 2.

The conference served three principal functions. First, I clarified an apparent source of confusion on the part of New York with regard to the parameters of the boundary to be surveyed. In the Final Report, I explained that the boundary should be drawn as described therein and as depicted in Appendix K as nearly as possible to encompass an area of 4.89 acres. Final Report at 166. I further noted, however, that the designated acreage was somewhat flexible. *Id.* The purpose of this flexibility was not to expand New York's borders but to ensure that if more than 4.89 acres were needed to encompass the boundary described in Appendix K it could be exercised accordingly. Needless to say, having drawn my recommended boundary by using scales from two maps of differing ages, I could not be sure that my estimated 4.89 acre description would stand up to the survey process.

During the telephone conference, New York stated that she had not understood the Final Report in that respect; instead, she apparently believed the Final Report accorded the parties some discretion in reshaping the boundary and re-estimating the MLW mark upon which the 4.89 acre area is based. Tr. 4/10/97 at 9-16. In explaining the intent of that part of the Final Report, *id.* at 7-16, I emphasized that the task of having the boundary surveyed was to be a "ministerial," rather than discretionary, undertaking, *id.* at 4, 10.

Second, the telephone conference was intended to establish a deadline for the parties to complete surveys. New Jersey estimated that she would have a survey completed by April 21. *Id.* at 7, 14. New York explained that although she had not yet hired a surveyor, she would do so, and would provide a survey within a matter of weeks. *Id.* at 5, 17.

The third function of the conference was to clarify that I would invite no further testimony regarding the recommended boundary. *Id.* at 9-10, 13-14. (Subsequently, New York misapprehended the point of the survey exercise. She did not conduct a survey, and did seek to introduce further testimony at the May 14, 1997 conference among the parties).

On April 22, 1997, New Jersey served New York and the Office of the Special Master with two draft surveys, designated "A" and "B," and a letter discussing minor variances between the descriptions contained in the Final Report concerning the boundary and the surveys on the ground. Letter from New Jersey Assistant Attorney General Joseph L. Yannotti to Special Master Paul R. Verkuil (Apr. 22, 1997) (Docket Item No. 390).

On May 7, 1997, New York sent four draft maps prepared by her experts Drs. Lawrence Swanson and Donald Squires to New Jersey and the Special Master. The transmittal letter accompanying the maps explained that they were drawn as overlays on New Jersey's survey and the

1857 map and were expressly “intended to show alternative ways to implement the specific findings” of the Final Report. Letter from New York Assistant Attorney General Judith T. Kramer to Special Master Paul R. Verkuil at 1 (May 7, 1997) (Docket Item No. 391). Because two of the four maps submitted by New York partitioned the Main Building, they were amended by a later letter to avoid that flaw. Letter from New York Assistant Attorney General Judith T. Kramer to Special Master Paul R. Verkuil (May 9, 1997) (Docket Item No. 392). At the May 14, 1997 hearing held on Ellis Island and discussed below, revised maps were presented by New York to incorporate the entire Main Building within New York. Maps Introduced into the Docket by New York (May 14, 1997) (Docket Item No. 393).

2. May 14, 1997 Conference on Ellis Island

On May 14, 1997, I convened a conference on Ellis Island in order to analyze New Jersey’s surveys of the boundary and to determine which survey to include in the proposed final Decree to be submitted to the Court. Tr. 5/14/97 at 3-4 (Docket Item No. 394). New Jersey’s surveys were the only ones available to me, because New York produced no survey. In addition to the States of New Jersey and New York, the City of New York and the Preservation Amici, *see* Final Report at 18, were represented at the conference. Tr. 5/14/97 at 2.

The conference resolved all remaining issues. At my request, New Jersey’s surveyor, Mr. Louis D. Marchuk, first led the conference participants on a walk along the points of his surveys of my recommended boundary. He explained the small differences between the two surveys he prepared on behalf of New Jersey and answered questions posed by New York, the amici, and the Special Master. *Id.* at 5-8. All participants had a clear understanding of how the surveys would work in practice.

After this exercise, no one disputed the accuracy of the survey, and New York expressly stated that she had “[n]o

objections as to the way in which Mr. Marchuk executed the lines on [Surveys] A and B as he's explained them." *Id.* at 9.

Given the choice between Surveys A and B, the State of New York and the Preservation Amici preferred Survey A. In particular, counsel for the Preservation Amici highlighted the impracticability of Survey B, whose boundary in places hugs the Main Building:

MR. KERR [for the Preservation Amici arguing for the state of New York]:

The principal concern we have with Plan B . . . as it follows the line of the wall of the main building, as we understand it, about a foot or so from the base of the building, it is not sufficiently far away from the building to make the entire building within New York and specifically the eaves would overhang into New Jersey, so we think that's a very practical problem.

Secondly, in terms of any work on the building on the exterior, you would, in effect, have scaffolding in New Jersey in order to work on the building in New York

Tr. 5/14/97 at 13. The statement echoed my principal concern in designing the recommended boundary in the first place. *See* Final Report at 163. For her part, New Jersey stated she was willing to accept either survey. Tr. 5/14/97 at 15. New Jersey had offered two surveys pursuant to my request. Survey B literally expressed the 4.89 acre limitation, while Survey A created a more workable boundary by adding slightly to the acreage (5.1 acres). As New Jersey presumably understood in offering these surveys, Survey A better met the purposes of my earlier description in Appendix K, even though it did not exactly comply with the literal 4.89 acre dimension, as expressed in Survey B. New Jersey's submissions were therefore exactly what I had requested.

As indicated, the State of New York produced four corrected maps, instead of surveys, *id.* at 4-5, which depicted proposed reconfigurations of the boundary, *id.* at 16, 42. In addition, New York attempted to introduce testimony by one of her trial experts, Dr. Swanson, concerning these four maps and another early map prepared in 1841. *Id.* at 24. I ruled such testimony out of order. *Id.* at 40.

Having examined the surveys prior to the conference; addressed relevant questions raised during Mr. Marchuk's tour and description of the boundary; heard other testimony and argument; and reaffirmed on the ground the practicalities and feasibility of the boundary I recommended in the Final Report, I selected Survey A, with one small change, as best depicting the boundary recommended to this Court in my Final Report. I requested that New Jersey submit a final survey incorporating that change in what would be my Designated Survey. *Id.* at 41-47.

THE RECOMMENDED BOUNDARY

A. New Jersey's Surveys

Each of New Jersey's surveys filed on April 22, 1977 draws a boundary resembling the boundary depicted in Appendix K of the Final Report. There are slight variations between the two surveys and the Appendix K boundary, however, and, obviously, variations between the surveys themselves. I set out below a detailed description of these surveys for the Court's consideration.

1. Survey A

The boundary drawn in Survey A closely resembles the boundary depicted in Appendix K of my Final Report, with three principal differences. First, Survey A encompasses 5.1 acres rather than the 4.89 acres I suggested would ideally encompass New York's acreage. This additional 0.2 acres easily fits within the zone of flexibility I recommended. *See* Final Report at 166. Second, in the

Survey, the corridor connecting the Main Building to the Baggage & Dormitory Building ("the B & D Corridor") could not be divided in the manner described in the Final Report without intersecting a portion of either the Main Building or the Baggage & Dormitory Building. *See* Letter from New Jersey Assistant Attorney General Joseph Yannotti to Special Master Paul R. Verkuil at 1-2. Accordingly, Survey A seeks to preserve the intent of Appendix K—evenly dividing the area between the Main Building and the Baggage & Dormitory Building on either side of the B & D Corridor—by making more obtuse the angle formed at the intersection of the line dividing the area between the Main Building and Baggage & Dormitory Building and the line intersecting the B & D Corridor.

The other principal difference between Survey A and Appendix K is the distance between the boundary line and the back of the Railroad Ticket Office on the northeast side of the Main Building. Survey A makes this a margin of fifty feet, rather than the ten-foot margin described in Appendix K, in order to encompass the remains of Fort Gibson. This is a favorable departure from Appendix K because it affords New York a more gracious margin of sovereignty around the Main Building and preserves her jurisdiction over the original fort located on the Island.

The only other difference between Survey A and Appendix K occurs at the intersection of the boundary on the northeast side of the Main Building and the triangle-shaped area on the southeast side of Island Number One. In the Final Report, I suggested that this northeast boundary line intersect the point where the east side of the triangle-shaped area intersects the southeast side of Island Number One. Final Report at 165. In both Surveys A and B, however, the northeast boundary line intersects the east side of the triangle-shaped area at a point slightly south of the point of intersection I recommend in the Final Report.

This discrepancy is inconsequential. It appears that the boundary was drawn in this manner for two reasons. First, although I described the boundary in the Final Report as set out above, in Appendix K the red area depicting New York's sovereign territory in fact actually draws this portion of the boundary approximately as Surveys A and B depict it. This was an unintended but minor discrepancy between the boundary description in the Report and the graphic representation of the boundary in Appendix K. Second, Mr. Marchuk and his assistant explained during the walking tour of the Island that, had the boundary line been drawn as described in the Report, the line drawn from the intersection of the east side of the triangle-shaped area and the southeast side of Island Number One would intersect the boundary on the northeast side of the Main Building at a point further northwest than described in the Final Report.

2. Survey B

Survey B differs from Survey A in two respects. First, the boundary line on the northeast side of the Main Building (on either side of the B & D Corridor) is flush with the sides of the Main Building, rather than at a margin. Similarly, the boundary on the northwest side of the B & D Corridor is flush with the Corridor. Second, consistent with the boundary described above, the boundary running through the B & D Corridor intersects the sides of the Corridor at a ninety-degree angle. This line extends from the boundary on the small portion of the northeast side of the Main Building on the southeast side of the B & D Corridor, flush with the Main Building, through the Corridor, intersecting the line flush with the northwest side of the Corridor. The margin of fifty feet behind the Railroad Ticket Office is achieved by drawing a line flush with the small northwest portion of the Railroad Ticket Office and extending it to intersect at a ninety-degree angle a line drawn fifty feet behind the Railroad Ticket Office and parallel to the back of the Ticket Office. As noted

above, like Survey A, Survey B includes the small discrepancy with regard to the triangle-shaped area of Island Number One.

I have selected Survey A rather than Survey B for several reasons. First and most important, the boundary in Survey A does not hug the Main Building at any point. Second, Survey A successfully embodies all of the equitable goals set forth in my Final Report. Third, the State of New York and the Preservation Amici all prefer Survey A. Tr. 5/14/97 at 11-14.

B. The Designated Survey

The Designated Survey has been lodged with the Clerk of the Court. It describes in precise terms the boundary in the Final Report. It is essentially Survey A produced by New Jersey on April 22, 1997 (the original of which has also been lodged with the Clerk of the Court), with some minor variations.

Although Survey B encompasses exactly 4.89 acres of land, it does so by sacrificing some degree of practicality and convenience. The proposed boundary lines of Survey B that are flush with the Main Building create the inherent difficulty of undertaking an activity near the Building, such as repairs, without straddling state lines. *Id.* at 13, 42-43. Also, because there are decorative eaves around the top of the Main Building extending outward several feet, *id.* at 12-13, in Survey B a vertical line drawn from the top of the northeast side of the Main Building in the area northwest of the B & D Corridor, for example, would intersect the ground in New Jersey's territory. It is self-evident that such a boundary would be unfair to both States, causing unnecessary complications for state-controlled matters, such as application of workers' compensation laws.

The Designated Survey is superior to Survey A in one respect. It amends Survey A so that the boundary inter-

sects the B & D Corridor at right angles to the sides of the Corridor. *Id.* at 43-46. There are at least two advantages to this correction. First, there is a consistency with regard to the two physical structures intersected by the boundary, as both Corridors are intersected by a line drawn at right angles to the sides of the Corridors. Second, the amended boundary intersecting the B & D Corridor is more easily ascertained in the Corridor itself, as New York's territory ends at the threshold of the Baggage and Dormitory Building.

Finally, there remain two de minimus aspects of the boundary set out in the Designated Survey which warrant discussion. First, as alluded to above, the Designated Survey retains the discrepancy with regard to the description of the boundary near the triangle-shaped area of Island Number One. I am satisfied that the objectives sought by drawing the line in the manner described in the Report are equally well served by the boundary drawn in the Designated Survey. *Id.* at 46-47.

Second, Mr. Marchuk explained during the walking tour that the boundary line parallel to the northwest side of the Main Building divides the stairway to the corridor connecting the Main Building and the Boathouse Building in such a manner that approximately five inches of the southeast railing of the stairway is in New York territory. The entire stairway should be regarded as New Jersey territory, but without otherwise changing the location of the boundary line on the northwest side of the Main Building.

C. New York's Maps

New York produced four maps instead of the survey I requested. The maps do not comply with my request that this final phase should provide a precise survey of my recommended boundary. At the same time, these maps serve a useful purpose: they essentially repropose the template approach I considered but rejected for the rea-

sons addressed in my Final Report and above, *see supra* pp. 2-3. The maps add random areas of New York's territory to the area covered by the original Island (the template) in attempting to address the practical and equitable concerns I raised in my Final Report. The maps serve to illustrate all of the handicaps I found with the template approach and reinforce my conviction that the boundary described in the Final Report, with the small deviations reflected in the Designated Survey, is superior to any other proposed boundary in terms of convenience, practicality and fairness. I included these maps on the record. Tr. 5/14/97 at 40-41. They are at Docket Item No. 393.

CONCLUSION

The precise description of the boundary line separating the sovereign territory of the State of New Jersey and the State of New York on Ellis Island is set forth in the Designated Survey lodged with the Clerk of the Court. I propose that this Court issue the Decree set forth on pages 169 to 170 of my Final Report, inserting the following description of the boundary in Paragraph 3 following the sentence stating: "The boundary between the two States on Ellis Island lies along the line described as follows:"

This description incorporates precise distances, in feet, only where the boundary line or points of intersection cannot be otherwise easily and accurately described.

A. Southwest Boundary

New York's territory on Ellis Island is bounded on the southwest by a boundary line running from the south corner of Island Number One, on the seawall of the ferry slip, to a point on the seawall of the ferry slip intersected by a line parallel to the northwest side of the Main Building that bisects the corridor connecting the Main Building and the Kitchen and Laundry Building.

B. Northwest Boundary

New York's territory is bounded on the northwest by the boundary line bisecting the corridor connecting the Main Building and the Kitchen and Laundry Building. This boundary line is located 18.00 feet from the base of the northwest side of the Main Building. Although this boundary line divides the stairway to the corridor connecting the Main Building and the Kitchen and Laundry Building such that approximately five inches of the southeast railing of the stairway technically is on the New York side of the boundary line, the entire stairway is New Jersey territory. The boundary on the northwest side of the Main Building forms a right angle at its intersection with the first segment of the boundary line on the northeast side of the Main Building.

C. Northeast Boundary

New York's territory is bounded on the northeast by a boundary consisting of six segments.

The first segment runs parallel to and 18.00 feet from the base of the northeast side of the Main Building, for a distance of 40.00 feet from its point of intersection with the boundary line on the northwest side of the Main Building.

The second segment intersects the corner of (1) the northwest side of the corridor connecting the Main Building and the Baggage and Dormitory Building (the "B & D Corridor" or "Corridor") and (2) the southwest side of the Baggage and Dormitory Building.

The third segment runs through the Corridor at right angles to the sides of the Corridor, to a point 5.00 feet from the base of the northwest side of the Railroad Ticket Office.

The fourth segment extends 56.31 feet parallel with the northwest side of the Railroad Ticket Office.

The fifth segment runs parallel to the northeast side of the Railroad Ticket Office at a margin of 50.00 feet.

The sixth segment runs parallel to the south side of the triangle-shaped area on the southeast side of Island Number One, to a point on the east side of the triangle-shaped area 219.61 feet from the point where the south and east sides of the triangle-shaped area intersect. The point of intersection between the fifth and sixth segments is 75.58 feet from the intersection of the sixth segment and east side of the triangle-shaped area.

D. Southeast Boundary

New York's territory is bounded on the southeast by a boundary that runs from the point of intersection of the sixth segment of the northeast boundary and the east side of the triangle-shaped area, follows the contours of the triangle-shaped area, and intersects the southwest boundary at the south corner of Island Number One on the seawall of the ferry slip.

Respectfully submitted,

PAUL R. VERKUIL
Special Master

Date: May 30, 1997